* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **CS(OS) No.213 of 2009**

% **Date of Decision: 20.11.2009**

Rubaljit Singh .... Plaintiff

Through Mr. Amarjit Singh Advocate, Ms. Supreet Advocate, Mr. Navneet Moni Advocate and Mr. Shruva Bhagat Advocate for plaintiffs.

Versus

M/s Kanz Overseas & anr. .... Defendants

Through Mr.A.K.Goel Advocate with Mr. Amit Srivastave Advocate for defendants

CORAM:
HON'BLE MR. JUSTICE ANIL KUMAR

1.	Whether reporters of Local papers may be allowed to see the judgment?	YES
2.	To be referred to the reporter or not?	YES
3.	Whether the judgment should be reported in the Digest?	YES

ANIL KUMAR, J.
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IA 1399/2009 (Plaintiff's application u/o 39 Rules 1 & 2of CPC)
IA 2761/2009(Defendants' application u/o 39 Rule 4 of CPC)
IA 2762/2009(Defendants' Application u/O 39 Rules 1 & 2 of CPC)

1. These are the applications by the plaintiff under Order XXXIX Rules 1 and 2 read with Section 151 of the Code of Civil Procedure and by the defendants under Order XXXIX Rule 4 for vacation of interim order dated 9th February, 2009 restraining the defendant from using mark 'KANZ' in respect of door closures, door closing devices, hydraulic

door closures, hardware fittings, glass hardware and restraining the Defendants from using mark 'KANZ' on his packaging material and his catalogue and passing of his goods as that of plaintiff and Defendants' application under Order 39 Rules 1 & 2 of Code of Civil Procedure seeking restrain against the plaintiff from using mark 'KANZ' in respect of door closures, door closing devices, hydraulic door closures, hardware fittings, glass hardware and restraining the plaintiff from using mark 'KANZ' on his packaging material and his catalogue and passing of his goods as that of Defendants.

2. The plaintiff has filed the above-noted suit contending inter alia that he is engaged in the business of the manufacture, import and sale of door closures, door closing devices, hydraulic door closures, hardware fittings, glass hardware fittings etc. in the name and style of Classic Devices as a sole proprietor. The plaintiff contended that he is established in the trade since the year 1994 and he had obtained central sales tax registration in the year 1994 and he obtained an import license in the year 2005 for the import of goods of his interest. The plaintiff also contended that he is one of the Directors of another company, `Efficient Devices Pvt. Ltd.', which company is in business since the year 2000 and is a family concern of the plaintiff with his mother as a shareholder and a Director. The father of the plaintiff is also stated to be in the similar business which he is carrying on

business in the name and style of M/s. Hardwyn Industrial Trading Corporation at B-136, Mayapuri Industrial Area, Phase I, New Delhi, since 1965. The trade mark `Hardwyn' is used by his father's firm and through the father's firm licensee `Efficient Devices Pvt. Ltd. in respect of goods are being imported by it. The plaintiff asserted that in January 2007 he conceived and invented the trade mark 'KANZ' and since then the trade mark has been continuously and extensively used in the course of the trade by the plaintiff. The trade mark 'KANZ' is represented in a particular artistic and distinctive manner. According to the plaintiff, the goods sold by him have a packaging material and catalogue in the form of card board boxes having unique getup, layout, color combination and arrangement. For the purpose of trading the goods, the plaintiff is alleged to have engaged the services of Mr.Subhendu Banerjee carrying on business as Square Heads, 147 B, LIG Flats, Rajauri Garden, New Delhi and an artist by profession who prepared the original artistic work. An agreement is alleged to have been executed between the Artist and the plaintiff for creating and devising the device.

3. According to the plaintiff, the trade mark 'KANZ' is widely and extensively used in the course of trade and the total sale of the plaintiff from 1st April, 2007 was Rs.23,94,802/- and from 1st April, 2008 to 31st December, 2008 was about Rs.15,61,464/-. The plaintiff has also

alleged to have spent substantial amount of money. The plaintiff is also alleged to have filed applications for the registration of the trade mark 'KANZ' with the Registrar of Trade Marks which are pending for registration. The plaintiff has also claimed copyright in the artistic work in the manner in which the trade mark 'KANZ' is represented.

4. The plaintiff alleged that the defendant No.1 is a firm which is an imposter of same description of goods and defendant No.2 is the proprietor or partner of defendant No.1. According to the plaintiff, defendants have dishonestly, malafidely and deliberately adopted the identical trade mark 'KANZ' in respect of goods of their import and sale. According to the plaintiff, the defendants have not only adopted an identical trade mark 'KANZ' in respect of the identical description of goods but they have also reproduced the artistic manner in which the trade mark 'KANZ' is represented.

5. The plaintiff contended that the defendant No.2 had been actively associated with the business activities of the plaintiff and is associated with his firms during past years and had even been representing the plaintiff's company, `Efficient Devices Company Pvt. Ltd.', carrying on business at B-4/237, Safdarjung Enclave, New Delhi. The plaintiff has also contended that in December 2006 and December, 2007 there was an exhibition of hardware goods organized by ZAK Trade and Exhibitors at Delhi and Mumbai and defendant No.2 was part of the team

representing the plaintiff's company for promoting the business and the goods of the plaintiff company. The plaintiff has also alleged to have sponsored the visit of defendant No.2 to China in the month of March 2007 when plaintiff visited China with defendant No.2.

6. The plaintiff contention is that in July 2008 it was learnt by him that defendant No.2 was trying to establish his personal and direct relationship with some of the manufacturers of hardware goods in China where defendant No.2 was taken by plaintiff during their joint visit in March 2007. The plaintiff also alleged that defendant No.2 was also trying to procure and import hardware goods from China and setup his own business. It is asserted that in month of December 2008, plaintiff was surprised to see the goods bearing his trade mark 'KANZ' in the market. The goods had striking similarity with the goods of the plaintiff having identical packaging getup, layout, color combination and arrangement. According to the plaintiff, inferior quality goods were sold and offered for sale under an identical trade mark 'KANZ' which did not bear the complete particulars of manufacturer or importer or seller of such products. It is also contended that the detail of the inferior goods was not available even from the domain name www.kanzhardware.com which was stated on the goods. In the circumstances, the plaintiff filed the above-noted suit for perpetual injunction seeking restrain against the defendants from passing off

their goods as that of the plaintiff and infringing his trade mark and also infringing the copyright of the plaintiff and for rendition of accounts and damages. By an ex parte interim order dated 9th February, 2009 the defendants were restrained from using mark 'KANZ' in respect of their goods and they were also restrained from using the mark 'KANZ' on their packaging material, their catalogue and passing off their goods as that of the plaintiff.

7. The application of the plaintiff under Order 39 Rules 1 & 2 is opposed by the defendants. The defendants have filed the reply to the application of the plaintiff for interim injunction and have also filed an IA No.2761/2009 under Order XXXIX Rule 4 of Code of Civil Procedure for vacation/modification of ex parte interim order dated 9th February, 2009. The defendants contended that defendant No.2 is well experienced in the field of marketing and trade hardware items and had worked in retail of goods from 1995 to 2005 and has got vast experience in marketing, trading of hardware items. In the year 2006, he left the said job and stated his own business of job work in stainless items under the name and style of Balwant Plastic Industries. According to him, apart from the business of job work, the defendant No.2 from the year 2006 till May/June 2008 has also been associated with `M/s. Efficient Devices Pvt. Ltd.', M/s Classic Devices M/s.Hardwyn Industrial Trading Corporation, the firms or the companies which

belong to the plaintiff or his family members. The defendant No.2 had been working for marketing, sales and other field work on assignment basis.

8. The defendants contended that the wife of defendant No.2, Smt. Jaspreet Kaur, showed interest to start her own business in trading of hardware items and, therefore, requested defendant No.2 to assist her. On January 6, 2008, it is asserted that Smt.Jaspreet Kaur adopted the word 'KANZ' as a trademark and Kanz Overseas as a trade name. The word 'KANZ' has been coined, conceive and adopted by Smt. Jaspreet Kaur from the name of her own son, Kanwalzit Singh. The mark 'KANZ' has been adopted from initial part of the said name **Kan**wal**z**it. The defendant No.2 contended that in May or June 2008 he completely disassociated himself from the companies of the plaintiff with the intention to assist his wife, Smt. Jaspreet Kaur. The wife of the defendant No.2 also inducted Sh. Sonu Dawani as a partner of the firm, M/s.Kanz Overseas and a partnership deed dated 1st November, 2008 was also executed between his wife Smt. Jaspreet Kaur and Smt.Sonu Dawani. Defendant No.1 has also filed an application for registration of trade mark consisting of word 'KANZ' for statutory protection. The defendant No.1 had applied for registration of the trade mark 'Kanz Overseas' on 18th July, 2008 in respect of door closures and door handles included in class VI and an application for registration of trade

mark 'KANZ' on 16th September, 2008 in respect of floor machine, spring of piston rings which are pending before the Registrar of Trade Mark. The defendants have also contended that they got the domain name www.kanzhardware.com, registered on 29th August, 2008 and www.kanzoverseas.com registered on 12th September, 2008. According to the defendants, in October 2008 Mr.Amit of M/s. Unicorn Business made artistic mark bearing trade mark and label 'KANZ' including visiting cards, letter heads, envelope bearing trade mark/label 'KANZ' for M/s. Kanz Overseas and a amount of Rs.10,500/- was paid for the said work on behalf of M/s. Kanz Overseas. The defendants claimed that the defendant No.1 is the owner of the copyright of the original art work.

9. The defendant No.1 also alleged that he visited China in October 2008 for placing order for supply of goods under the trade mark 'KANZ' for his own business and packaging and he took samples of the goods under the said mark.

10. On 1st November, 2008, Kanz Overseas is also stated to had taken on rent premises bearing No.Flat No.1-132, Sector II, DSIDC, Bawana Industrial Area, Delhi-110039 and a rent agreement dated 1st November, 2008 has been executed. A TAN number is also alleged to have been issued in the name of Kanz overseas on 1st November, 2008 by the Income Tax Authority. The defendants have also alleged to have

participated in the trade exhibition held at Pragati Maidan on 5th, 6th and 7th December, 2008 and publicized his business and trade mark. The defendants also alleged that they made payment of Rs.91,010/- to the fair organizers vide receipt dated 3rd December, 2008. The defendants have contended that the plaintiff visited the stall of defendant No.1 and threatened the defendants to stop business under the said name otherwise plaintiff will go to any extent to stop the defendants from doing the business and since the defendants did not give any heed to such illegal threats of plaintiff, the documents have been fabricated and the present suit has been filed and an ex-parte order has been obtained by misleading this Court.

11. According to the defendants, they have given wide publicity to their mark 'KANZ' and they had been selling goods under the said trade name. Defendants have alleged that the suit of the plaintiff is based on false averments and fabricated documents and the ex parte interim injunction order dated 9th February, 2009 has been obtained on the basis of false averments and forged and fabricated documents and the plaintiff has not come to the court with clean hands and the interim order is liable to be vacated.

12. The defendants have contended that though the plaintiff alleged that he had been manufacturing goods and selling them since January 2007 but the firm of the plaintiff, Classic Devices, has not carried out

manufacturing activities in respect of said goods and therefore there was no occasion to adopt the trade mark 'KANZ' for the manufacture of said goods. It is contended that no excise bill has been filed by the plaintiff to show that he has been manufacturing the said goods under the mark 'KANZ' . It is contended that the plaintiff has copied the trade mark/label 'KANZ' of defendant No.1 with a malafide intention to en-cash the goodwill and reputation of defendants' business and to eliminate the defendants from using the mark by putting undue pressure on them. Defendants have also relied on a certificate issued by the Artist of the plaintiff, Mr.Subhendu Banerjee, to the defendants. They further contended that the signatures of Mr.Subhendu Banerjee do not tally with the alleged signatures of said Artist on the product catalogue and on assignment deed dated 8th January, 2007. In the circumstances, it is alleged that the plaintiff did not get the deed of assignment on 8th January, 2007 nor the artistic work was created by Subhendu Banerjee in favor of plaintiff and assigned to him on that date. It is also contended that the alleged assignment deed has not been written and executed on 8th January, 2007 as Mr.Salil Sagar has also given a certificate to the defendants to the effect that he had signed the said deed at the instance of Mr.Rubaljeet Singh on or about 3rd February, 2009 and, therefore, the deed of assignment dated 8th January, 2007 is forged and fabricated. The defendants have also

alleged that sales invoices filed by the plaintiff in support of his contention that he is marketing goods under the name of mark 'KANZ' since January 2007 are forged and fabricated. The plea is also raised by the defendants that price lists produced by the plaintiff are also forged and fabricated as the phone numbers given on the price list as 9212474768-/69 were not even allotted to the plaintiff in January 2007 when the alleged price list was allegedly issued.

13. In order to show a prima facie case the plaintiff has alleged that he is engaged in the business/manufacture and sale of door closures, door handles, hydraulic door closures, hardware fittings, glass fittings, locks and handles under the name and style of Classic Devices as its sole proprietor. Sh.Rubaljeet Singh, plaintiff is also alleged to be a Director of the company Efficient Devices Ltd which is also one of the leading and reputed importer and trader of hardware goods and is manufacturing the goods under the name and style of `Hardwyn Industrial Trading Corporation' and the trademark is `Hardwyn'. According to the plaintiff he conceived, invented and adopted the trademark Kanz and in order to have a distinctive packaging material and catalogue he had engaged the services of Mr.Subhendu Banerjee trading at 147B, LIG flats, Rajouri Garden, New Delhi. The artistic work relating to packaging of Kanz products was conceived, devised and created by Mr.Subhendu Banerjee who had assigned the rights in the

artistic works by Assignment Deed dated 8th January, 2007. The Deed of Assignment was exhibited as exhibit P1 as the statement of plaintiff was recorded on 26th March, 2009 who had deposed that the Deed of Assignment was signed on 8th January, 2007 by Subhendu Banerjee on all pages in his presence. The Deed of Assignment also has a catalogue annexed to it which has phone numbers of Classic Devices as 011 28116583, 09212474768/69. In his statement recorded on 26th March, 2009 plaintiff admitted that in 2007 the phone number 09212474768/69 was not in existence as they were allotted to him in August/September, 2008.

14. If the pamphlet for the artistic work was got prepared by the plaintiff in 2007 how could he give the phone numbers which had been allotted to him almost after 1½ years later. The plaintiff has not explained as to how could he be certain that those phone numbers will necessarily be allotted to him after one and half years. Why should plaintiff use in 2007 the phone numbers which had been allotted to him in 2008 almost after eighteen months later? The explanation by the plaintiff that he already had other telephone numbers 09212474760/61/62/63 and, therefore, he gave the numbers 09212474768/69 is not believable. The plaintiff has not produced anything to show that the telephone department had assured the plaintiff of allotment of such numbers after eighteen months. In any

case the object of giving the phone numbers is that the clients interested in the products of the plaintiff could approach him on the phone numbers given and do the business. If the plaintiff already had other numbers 09212474760/61/62/63, the plaintiff would give those telephone numbers which he had and not the numbers which could be acquired by him later in time. These explanations have been given by the plaintiff since the defendant No.2 filed an affidavit giving the details of the activations of various phone numbers of the plaintiff including the phone number 09212474768/69 which were allotted him almost two years after he allegedly started giving these numbers on his pamphlets. In the circumstances, it is apparent that the plaintiff in collusion with Subhendu Banerjee has manipulated the alleged Deed of Assignment dated 8th January, 2007 or the plaintiff has fabricated the signature of Mr .Banerjee. The inevitable inference is that the Deed of Assignment was executed by the said artist Subhendu Banerjee after October, 2008 when the phone No.09212474768/69 was activated in favor of the plaintiff. The forgery and manipulation by the plaintiff regarding the Deed of Assignment alleged to be executed on 8th January, 2007 is also inferable from the fact that even other numbers that is 9212474760/61/62/63 were not in existence on 8th January, 2007 as even those phone numbers were activated on 26th August, 2007. If these numbers were also activated on 26th August, 2007 then

how the plaintiff could anticipate on 8th January, 2007 that these numbers will be allotted to him and on the basis of those numbers he could foresee that almost a year after 26th August, 2007 other phone number bearing No.09212474768/69 will be allotted to him in October, 2008. The plaintiff in the facts and circumstances has not only manipulated the document dated 8th January, 2007 but has not deposed correctly even in his statement dated 26th March, 2009 that on account of having other phone numbers 09212474760/61/62/63 he got the phone number 09212474768/69 printed on the catalogue which was annexed with the Deed of Assignment. The version of the plaintiff that he got the deed of assignment from Mr. Banarjee on 8th January, 2007 is false and is an attempt by the plaintiff to mislead this Court and the plaintiff obtained an ex-parte order from this Court on the basis of a false document.

15. The defendant has also produced a certificate issued by Subhendu Banerjee giving his specimen signatures along with a copy of his passport dated 2nd September, 2002 bearing his signatures under his photograph. The copy of the certificate of registration for the sales tax under Delhi Sales Tax, 1975 bearing the signatures of Subhendu Banerjee has also been filed giving the specimen signatures of Subhendu Banerjee. The naked eye comparison of the signatures of Subhendu Banerjee on his certificate of specimen signatures, passport

and the sales tax registration certificate reveal that the signatures on the alleged Assignment Deed are very different with the signatures of Sh.Subhendu Banerjee on the alleged assignment deed. The defendant has also produced a copy of the certificate dated 19th February, 2009 of the alleged attesting witness of Deed of Assignment dated 8th January, 2009 categorically stipulating that the Deed of Assignment was signed by him on 3rd February, 2009 at the instance of the plaintiff Mr.Rubaljeet Singh of Classic Devices, C-147, Mayapuri Phase II, New Delhi. From these documents and the statement given by the plaintiff it is apparent that the Deed of Assignment was not executed on 8th January, 2007 as has been falsely alleged by the plaintiff and it has already held that these must have been executed after August, 2008 when the phone numbers which are on the pamphlets annexed with the Assignment Deed were activated and allotted to the plaintiff which could be on 3rd February, 2009 as has been stated by the attesting witness of the alleged Deed of Assignment Mr.Salil Sagar.

16. The manipulations done by the plaintiff are also apparent from the fact that in order to counter the certificate given by Sh.Salil Sagar that Deed of Assignment was signed by him on 3rd February, 2009, apparently an affidavit has been obtained from the same attesting witness Sh.Salil Sagar dated 18th March, 2009 where the said attesting witness has contended that the certificate produced by the defendant of

Sh.Salil Sagar was got signed from the witness by Mr.Dilpreet Singh by threatening the witness with dire consequences. Surprisingly if such a certificate was got signed by Mr.Dilpreet Singh, the said witness or even the plaintiff on behalf of the said witness could have filed complaint or could have filed some other proceedings, however, nothing has been done. Another affidavit of Ms.Kritika Malhotra the alleged attesting witness of Assignment Deed has also been obtained who has deposed that her father Sh.Vipin Malhotra is a very close friend of Mr.S.S.Sahil, father of Mr.Rubaljeet Singh. Even the said witness goes on to depose on affidavit that the Deed of Assignment was signed on 8th January, 2007. Apparently even Ms.Kritika Malhotra prima facie has given an incorrect affidavit. Therefore, in the facts and circumstances on the basis of the alleged Assignment Deed which has been manipulated by the plaintiff, it cannot be held that he has been using the trademark 'Kanz' since January, 2007.

17. In order to substantiate the plea of prior user of the trademark `Kanz', the plaintiff has relied on the price list dated 15th July, 2007, 15th April, 2008 and 10th January, 2009. The price list effective from 15th July, 2007 also gives the phone number 9212474768/69 which phone numbers were activated on 7th October, 2008. The explanation given by the learned counsel for the plaintiff that since the price list was in the hard disk of the computer system of the

plaintiff and the print was taken, however, the first page of the price list was taken of the price list effective from 10th January, 2009 with a changed date to 15th July, 2007, therefore, the telephone number 9212474768/69 appeared is also a false plea of the plaintiff. The font of the first page of the price list effective from 2009 is different from the first page of the price list with effect from 15th July, 2007. Therefore, this plea that the first page of the price list of 2009 was taken and date was changed and, therefore, the telephone number which was allotted in October, 2008 also appeared in the price list of 2007 is not acceptable and is an attempt by the plaintiff to mislead this Court. The attempt by the plaintiff to mislead is also apparent from the fact that even on the price list effective from 15th July, 2007 starting with the prices of Kanz Mortise Locks, the same phone numbers are given. This is also apparent that the price lists of different years have also been manipulated. This inference is apparent as the price list effective from 10th January, 2009 on the first page shows that the price list is effective from 10th December, 2008 on the second page of that price list. The description of Kanz Mortise Locks, KML 400 (first Item) are different in the price lists. In any case if the plaintiff had simply changed the first page of the price list of 2007 by copying the first page of price list of 2009, the same should have been disclosed by the plaintiff when the suit was filed. These explanations are also not reflected in the pleadings

on behalf of plaintiff and have been given by the learned counsel for the plaintiff to justify the manipulations committed by the plaintiff. Similarly, the price list of 2008 cannot be relied on and apparently is a manipulated and fabricated document by the plaintiff to demonstrate his false plea that he had been trading under the trademark Kanz since January, 2007.

18. The fabrication of the copies of the price lists produced by the plaintiff can also be inferred from the fact that the products Kanz Stylo and Kanz Grace 91 included in the price list of 2007 and 2009 are stated to be ISI mark. The plaintiff himself has produced a communication dated 19th January, 2009 from Hardwyn Industrial Trading Corporation addressed to Director (Marks) I, Bureau of Indian Standards regarding license No.CM/L-0153833 and license no.CM/L-1515543 that they have started using ISI marks on Kanz door closure and they have taken permission from M/s.Classic Devices who are allegedly the actual owners of trademark 'Kanz'. If the plaintiff is also the Director of Hardwyn Industrial Trading Corporation and if he had been using the trademark Kanz since 2007 when the alleged Deed of Assignment dated 8th January, 2007 was allegedly executed, then why the plaintiff did not start using the ISI mark in 2007 has not been explained. If the permission is of 2009 then how the plaintiff had been showing the `Kanz' products as ISI marked product has not been

satisfactorily explained. If the ISI mark was permitted to be used in 2009 then how the ISI mark appeared in the alleged price list of 15th July, 2007 and 15th April, 2008 has not been explained. In the circumstances, the only probable inference is that the plaintiff has fabricated these price lists also in order to demonstrate falsely that he had been using the trademark `Kanz' in 2007 and 2008.

19. The plaintiff has also failed to give any plausible explanation for adopting the coined word "Kanz". In contradistinction the defendants have contended that Smt.Jaspreet Kaur wife of defendant No.2 had shown her interest to start her own business in trading of hardware items and had requested the defendant No.2 to assist her in the said business. In the circumstances on 6th January, 2008 the word "Kanz" was adopted as a trademark and Kanz Overseas as the trading style from the name of her son Kanwalzit Singh. The word Kanz has been adopted from the initial part of the said name that is **KAN**WAL**Z**IT. The defendants also got the domain name www.kanzhardware.com registered on 29th August, 2008 and another domain name www.kanzoverseas.com registered on 12th September, 2008 whereas no domain name was registered in the name of the Classic Devices of the plaintiff.

20. The application for registration of trademark Kanz Overseas under number 01711772 is dated 18th July, 2008 in respect of door

closures and door handles included in class 6, whereas the application for registration of mark Kanz under numbers 01762124 dated 10th December, 2008, almost after 5 months was filed by the plaintiff in respect of door closures, door closing devices, hardware fittings, glass fittings, locks and handles included in class 6. Another application for registration of mark Kanz under No.1762127 dated 10th December, 2008 was filed by the plaintiff in respect of hydraulic door closures included in class 7, but the defendant had filed an application earlier for the registration of trademark Kanz under number 01732764 dated 16th September, 2008 in respect of floor machine, string and piston rings included in class 7.

21. Learned counsel for the plaintiff has relied on Volume VIII No.16 Reports of Patent, Design and Trade Mark Cases 137, in the matter of Applications by The Apollinaris Company Limited; Volume XIII No.36 Reports of Patent, Design and Trade Mark Cases 600, in the matter of the European Blair Camera Company's Trade Mark; AIR 1984 Delhi 265, Glaxo Operations UK Ltd, Middlesex (England), and others v. Samrat Pharmaceuticals, Kanpur; 1998 PTC (18) 151, Radhika Agro Industries Pvt. Ltd. V. Paawan Agro Foods Ltd; 1997 PTC (17) 347, Bimal Govindji Shah v. Panna Lal Chandu Lal and 1996 PTC (16) 575, Jai Prakash Gupta v. Vishal Aluminium Mfg. Co. in support of pleas and contentions of the plaintiff.

22. In Jai Prakash Gupta *(supra)*, it was held that in passing off action, the defendant cannot escape the liability on the ground that plaintiff himself is pirator of another person. It was further held that priority in use is superior to priority in registration. The court had relied on Century Traders v. Roshan Lal Duggar & Co. and another, AIR 1978 Delhi 250 holding:-

> "The law is pretty well settled that in order to succeed at this stage the appellant had to establish user of the aforesaid mark prior in time than the impugned user by the respondents. The registration of the said mark or similar mark prior in point of time to user by the appellant is irrelevant in an action for passing off and the mere presence of the in the register maintained by the trade mark registry did not prove its user by the persons in whose names the mark was registered and was irrelevant for the purposes of deciding the application for interim injunction unless evidence had been led or was available of user of the registered trade marks."

23. In Bimal Govindji Shah (*supra*), this Court had held that it is manifestly clear that Section 28 of the Act and other provisions come within the overriding effect of Section 27(2) of Trade and Merchandise Marks Act, 1958. Relying on Section 33 of the said Act, it was also held that the same saves vested right of a prior user when it lays down that "nothing in the Act shall entitle the proprietor or a registered user of a registered trade mark to interfere with or restrain the use by any person of a trade mark identical with or nearly resembling it in relation to

goods in relation to which that person is predecessor in title of this and has continuously used that trade mark from a prior date". In the circumstances, it was held that neither Section 28 nor any other provision of the Act prohibits an action for passing off by an anterior user of a trade mark against a registered user of the same. Therefore, the registration of the trade mark does not provide a defence to the proceedings for passing off as provided for under Section 27 (2) of the Act and a prior user of a trade mark is entitled to maintain an action against a subsequent user of identical trade mark including registered user thereof. Relying on N.R. Dongre v. Whirlpool Corporation, AIR 1995 Delhi 300, it was held that the registration of a trade mark under the Act would be irrelevant in an action of passing off as the registration of a trade mark does not confer any new right on the proprietor thereof than what already existed at common law without registration of mark. Thus registration itself does not create a trade mark and that the trade mark exist independently of the registration which merely affords further protection under the Statue. The common law rights are left wholly unaffected and that priority in adoption and use of trade mark is superior to priority in registration. The Court in para 15 had summed up the legal proposition as under:-

> "15. The legal proposition that emerges from all the aforesaid decisions is that the registration is immaterial in a case of passing off and the criteria for granting an

> injunction is the prior user of the trade mark by the parties. In other words, "in an action for passing off, in order to succeed in getting an interim injunction the plaintiff has to establish user of the mark prior in point of time than the impugned user by the defendant and that the registration of the mark or similar mark prior in point of time to user of the plaintiff is irrelevant in an action of passing off and the mere presence of the mark in the register maintained by the trade mark registry did not prove its user by the persons in whose names the mark was registered and it is irrelevant for the purpose of deciding the application for interim injunction unless evidence had been led or was available of user of the registered trade mark."

24. Learned counsel for the plaintiff relying on Bimal Govindji Shah (*supra*), had contended that for arguable dispute has been raised by the defendant as regards the bills produced by the plaintiff showing prior user but it would not be appropriate that further evidence is not to be given nor any finding about the said dispute raised by the defendant as to whether the plaintiff is guilty of fabrication or not, it would be a matter to be considered and decided during the course of the hearing of the suit.

25. Relying on Radhika Agro Industries Pvt. Ltd. (*supra*), it is asserted by the plaintiff that at the stage of interim order it is not proper to give any finding on issue whether some of the invoices are fabricated or not because it would be a matter to be considered and decided after trial. The single Judge of this Court in Radhika Agro

Industries Pvt. Ltd. (*supra*) had noticed that the plaintiff had been able to establish user of trade mark 'Jiwan Dhara' prior in time than its user by the defendant and in the circumstances at the stage of the interim order it was held not proper to give finding on the issue whether some of the invoices furnished by the defendant are fabricated or not because it was held to be a matter to be considered and decided after trial. The Court had further held that looking at the copies of the invoices it was apparent that the words 'Jiwan Dhara' had been inserted in the copies. It was held that when a party itself seeks relief of equity, it must unequivocally demonstrate that its hands are absolutely clean, which, *prima facie*, does not seem to be the case of the plaintiff.

26. In the matter of the European Blair Camera Company's Trade Mark (*supra*), a person named 'T' carried a business in Boston, U.S.A., and owned trade mark "Bull's-eye". The business was sold by him to another company during the period, 'T' had carried on the business, another company called E. Company imported cameras from 'T' and also got the word 'Bull's-eye' registered in England, whereafter K. Company purchaser of the business from the 'T' moved to expunge trade mark from the register. It was held by the High Court of Justice Chancery Division that since there was a user by 'T' in England, therefore, he had a clear right to oppose the registration and without his sanction the registration in favor of E. Company ought not to have

been made. Since there was no reliable evidence that the sanction had been given, it was held that the registration was made without sufficient cause and, therefore, the mark in favor of E. Company was struck off the register at the instance of K. Company.

27. According to the plaintiff, since the defendant is an importer of foreign goods, he cannot register as his own, the trade mark of a foreign producer. Whether the goods are produced by a process of manufacture or by a process of nature, or whether the importer has or has not an exclusive contract for this country, or whether the producer does or does not consent to the registration? Relying on the ratio of Apollinaris Company Limited (*supra*), it is asserted that the mark of the producer could not be registered as the trade mark of the importer who had no right to the product. This plea of the plaintiff is also not acceptable. This has not been shown even prima facie that the trade name used by the defendants is also used by another person or company who has exported the goods from a foreign country.

28. In case of passing off, on plaintiff placing on record the statement of its sale supported by the affidavit of the plaintiff, the plea of the defendant that ingredient of wide reputation was not proved, was not entertained in Glaxo Operations UK Ltd., Middlesex (England) and ors (supra), relied on by the plaintiff. Rather this Court had held that it is well known, than on the basis of the background, color, getup and

general appearance of the cartons, the article contained therein are purchased and that being so, a customer is likely to be deceived. It was further held that under Section 17, the emphasis is on the fact that the copyright vest in that person who is original creator of the work and in cases where it may not be possible to define as to who was the original creator, in such cases the person who get registration earlier or who establishes to be an earlier user ,can be presumed to be the author or original creator of the artistic work.

29. *Per contra* the defendant has relied on 2009 (39) PTC 16 (Del) (DB), Ram Krishan and Sons Charitable Trust Ltd. V. IILM Business School; 2000 PTC 326, Om Prakash Gupta v. Parveen Kumar & Another; JT 1993 (6) S.C. 331, S.P. Chengalvaraya Naidu v. Jagannath and other; 1998 (44) DRJ (DB) 109, Satish Khosla v. Eli Lilly Ranbaxy Ltd.; 1995 Rajdhani Law Repaorter (Vol.25) SC 1, Chander Shashi v. Anil Kumar and AIR 1965 Bombay 35 (V 52 C14), Consolidated Foods Corporation v. Brandon and Co. Pvt. Ltd. in support of its pleas and contentions including that the adoption and user of impugned mark by the plaintiff is dishonest and subsequent to the defendant.

30. Relying on Halsbury's Law of England, Vol. 48 4th Edition, paras 28, 29 of the Registered Trade Marks, it is contended by the defendants' counsel that the person who first designs or uses a trade mark is entitled to claim proprietorship in it. Referring to the Trade Mark Act,

1938, it was stated that the Act does not define "proprietor", however, it is the person claiming to be the proprietor who may apply for registration, and it is only the registered proprietor who may sue for infringement. It has been left to the Courts to decide what amounts to be a valid claim to be the proprietor.

31. A single Judge of Bombay High Court in Consolidated Foods Corporation (*supra*), had held that registration under the Statute does not confer any new right to the mark claimed or any greater rights than what already existed at common law and had equity without registration. Priority in adoption and use of a trade mark is superior to priority in registration and for the purpose of claiming such proprietorship of a mark, it is not necessary that the mark should have been used for considerable length of time. As a matter of fact, a single actual use with intention to continue such use *eo instant* confers a right to such mark as a trade mark. Even mere actual intermittent or experimental use may be insufficient to show an intention to adopt the mark as trade mark for specific article or goods. It was further held that it is not necessary that the goods should have acquired a reputation of quality in that mark. Actual use of the mark in such circumstances, showing an intention to adopt and use it as a trade mark, is the test, rather than the existence or duration of the use.

32. Learned counsel for the defendant has very strongly contended that the copies of invoices produced by the plaintiff are fabricated and has pointed out various discrepancies in the bills No.080, 063, 060, 024, 016, 187, 221, 260, 238, 169, 139, 134, 125, 156 and 096. It is contended that either there are additional commas in the copies produced and the copies obtained by the defendant form the dealers of the plaintiff. Various other discrepancies have also been pointed out between the contents of the invoices. Some of the copies have the GR numbers written in hand and the description of the goods are also different. The plaintiff filed the copies of the invoices/bills of different list of documents. Some of the discrepancies are as follows:

Discrepancies	Invoice No.101 at Pg. No.31 : Plaintiff's 1st List	Invoice No.101 at Pg. 20 Plaintiff's 2nd list
Date	20.08.2007	30.08.2007
Address	In three lines	In four lines
CST No.	Not Mentioned	Mentioned
Coma in address of firm at top of bill	Single coma	Double comma
Signature	Straight at different position	Oblique at different position

Discrepancies	Invoice No.074 at Pg. No.25 : Plaintiff's 1st List	Invoice No.074 at Pg. 21 Plaintiff's 2nd list
Address	In three lines	In four lines
GR/RR No.	Mentioned	Not mentioned
CST No.	Not Mentioned	Mentioned
Coma in address of firm at top of bill	Single coma	Double comma
Signature	Straight at different position	Oblique at different position

Discrepancies	Invoice No.260 at Pg. No.71 : Plaintiff's 1st List	Invoice No.265 at Pg. 22 Plaintiff's 2nd list
Description of goods	U-32 KANZ FLOOR SPRING	KANZ U-32 FLOOR SPRING
GR/RR No.	Not Mentioned	Mentioned
Signature	Straight at different position	Oblique at different position

Discrepancies	Invoice No.232 at Pg. No.68 : Plaintiff's 1st List	Invoice No.232 at Pg. 64 Plaintiff's 2nd list
Overwriting	No overwriting	Overwriting in total & tax amount
Sales Tax	Add : Central Sales Tax is written	Add : VAT is written

GR/RR No.	Not Mentioned	Mentioned
Signature	Straight at different position	Oblique at different position

33. It has also been pointed out that invoice No.169 dated 19th September, 2008, a copy of which is also filed have different signatures of authorized signatory. The fabrication of invoices is also contended on the ground that there are inconsistencies in the copies of the invoices filed by the plaintiff on different dates along with different lists of documents which shows unequivocally, manipulations and fabrications done by the plaintiff to show his alleged prior use. As an incident, it is contended that invoice No.169 shows that the goods were dispatched on 22nd September, 2008 to M/s. Atlas Metal, 59/8 Dev Raja Mudali Street, Chennai, which were received on 30th September, 2008, taking about eight days, whereas invoice No.118 dated 30th July, 2008 shows that the goods were dispatched on 31st July, 2008 and were received on 31st July, 2008, on the same day. This is reflective of fabrication and manipulation of copies of invoices, as the goods could not have reached from Delhi to Chennai on the same date, in one day.

34. The learned counsel for the defendant has also pointed out anomalies in the description of goods, as the code of some of the items sold by invoices does not correspond to the code given in the price list.

Some of the invoices have GR/RR numbers printed whereas the deposition of the plaintiff in one of the affidavit dated 18th March, 2009 is that GR/RR numbers are put in hand. Learned counsel for the defendant has also pointed out the code of the products used in the invoices of the plaintiff, to demonstrate that the copies have been manipulated in order to make out the alleged user of the trade mark of the defendant prior in time, when the defendant started using it. The defendants have also produced the fax copies of the invoices No.227 and 221 which is signed by Ms. Latika who has also given an affidavit dated 26th February, 2009 deposing that the invoices were signed by her. The deposition of Ms. Latika is contrary to the deposition of plaintiff in his affidavit dated 18th March, 2009 that Ms. Latika never signed any of the invoices issued by the plaintiff. The genuineness of the copies of the invoices becomes more doubtful in view of the affidavits of plaintiff's dealer M/s Rajkumar Dawani who has also produced invoice No.46 dated 12th June, 2007 which is signed by Ms. Latika, though according to the plaintiff Ms.Latika never signed any of the invoices. The plaintiff has also conveniently ignored answering this fact as his lie had been nabbed.

35. The plea of the plaintiff that the plaintiff was not maintaining the paper copies of the invoices is negated by another plea taken on behalf of the plaintiff that the number of GR/RR used to be put on the invoices

in hand. This is not the case of the plaintiff that after sending the goods by transport or railways and obtaining the GR/RR number, the same was added in the computer data of the invoices. In the circumstances, there is not just a solitary instance of discrepancies in respect of the copies produced by the plaintiff showing prior user but the cumulative effect of various discrepancies which the plaintiff has failed to explain and answer satisfactorily, the inevitable inference is that the reliance cannot be placed on the copies of the invoices produced by the plaintiff to demonstrate prior user of trade mark 'Kanz'. Consequently, on the basis of the invoices the plaintiff has failed to establish a prima facie case of use of trade mark 'Kanz' prior to defendant.

36. Learned counsel for the defendant has also emphasized the statutory obligation to maintain paper copies of the invoices under Section 50(3) of Delhi Value Added Tax Act, 2004 and no satisfactory explanation has been given by the plaintiff as to how by keeping only the copies of the invoices on the computer, the plaintiff has been complying with the statutory provisions.

37. Comparing the explanations given by the plaintiff and the defendant, the explanation for coining the word 'Kanz' by defendant being adopted from the name of son, Kanwalzit Singh, is more probable. Taking the pleas and contentions of the defendant, especially that defendant No.2 had dissociated with the firms and companies of

Rubaljit Singh, plaintiff, in May 2009 and joining his wife to assist her in the intending business to be carried on under the trade mark 'Kanz' which word was coined from the name of their son, the version of the defendant is more probable than the pleas and contentions raised by the plaintiff and, in the circumstances, it is inevitable to infer that the plaintiff has been unable to make out a case of prior user or adoption of trade mark 'Kanz' prior to that of defendant. The prior user of the defendant and the attempt by the plaintiff to create documents in order to counter the pleas and contentions of the defendants is further augmented by the fact that the defendant No.1 had applied for registration of the trade mark on 18th July, 2008 in respect of door closure and door handles included in Class VI whereas the plaintiff had applied on 16th September, 2008 in respect of floor machines, spring of piston rings in Class VII. The prior user of the defendant is further supported by the fact that the defendants got the domain name 'www.kanzhardware.com' which was registered on 29th August, 2008 and another domain name 'kanzoverseas.com' was registered on 12th September, 2008. The defendant has also been able to establish that in October 2008 he got the stationery for his product printed.

38. In contradistinction, the document relied on by the plaintiff regarding the assignment agreement of artistic work has already been disbelieved by this Court. In the chain of facts to demonstrate that the

user of the defendants is prior to that of plaintiff, another link is that PAN number issued in the name of M/s. Kanz Overseas by income tax authorities is prior to that of plaintiff. In the circumstances, prima facie, the plaintiff has failed to establish a prima facie case of prior user of trade mark 'Kanz' whereas from the documents and pleas and contentions of the defendant, the inference is that defendant is the prior user of trade mark 'Kanz'. Apparently, since the defendant is a prior user of trade mark 'Kanz', in case the defendant is restrained from using the mark 'Kanz', they will suffer great loss which may not be compensated in terms of money. In the circumstances, the balance of convenience is in favor of defendant and against the plaintiff and restraining the defendant from using their trade mark 'Kanz' shall also cause irreparable loss and injury in the facts and circumstances. Inevitably there are no grounds to continue the ex party restraint order granted by this Court dated 9th February, 2009 in favor of plaintiff and against the defendant which is liable to be vacated.

39. Consequently, the application of the defendant under Order XXXIX Rule 4 being IA No.2761 of 2009 is allowed and the ex parte injunction order dated 9th February, 2009 restraining the defendant from using the trade mark 'Kanz' is vacated and the application of the plaintiff under Order XXXIX Rules 1 and 2 is dismissed.

40. Since the defendant has been able to establish that he is prior user of the trade mark 'Kanz', rather he will suffer irreparable loss, if the plaintiff is allowed to continue using the trade mark 'Kanz'. The defendant shall also suffer greater inconvenience on account of use of trade mark 'Kanz' by the plaintiff. Therefore the application of the defendant being IA No.2762 of 2009 is allowed and the plaintiff is restrained from using the trade mark 'Kanz' in any manner himself or through his partners, agents etc. and reproducing, displaying or advertising the said trade mark and use it on any of his products in any way and passing of his goods as that of the defendants during the pendency of the present suit.

41. Learned counsel for the defendant has contended that in order to establish the prior use of the mark "Kanz" by the plaintiff, he has filed the assignment agreement, which is forged and fabricated; the price lists which are also fabricated and the copies of invoices which are also fabricated and thus the plaintiff has committed contempt of court and has relied on Chander Shashi (*supra*), where it was held that if a person file a false, forged or fabricated document with intention to obstruct or defeat justice then he is guilty of contempt. In the case relied on by the defendants, a fabricated certificate was filed by the husband opposing transfer of a matrimonial proceeding. The certificate was of a Principal of a College who had denied having issued such a certificate on an

affidavit on the basis of which *suo moto* action was initiated by the Court. It was held that to enable the courts to ward off unjustified interference in their working, those who indulge in immoral acts like perjury, pre-variation and motivated falsehoods have to be appropriately dealt with, without which it would not be possible for any court to administer justice in the true sense and to the satisfaction of those who approach it in the hope that truth will ultimately prevail.

42. A litigant who had filed another litigation after failing to get a relief in the earlier suit for specific performance, was held to have abused the process of law and such an action was considered to be a deliberate attempt to hamper and obstruct due course of judicial proceedings in administration of justice and it was held to be fraud upon court. This court had held that a litigant who approaches the court must produce all the documents which are relevant to the litigation and he must also disclose to the court about the pendency of any earlier litigation between the parties and the result thereof. It was further held that such in action where a litigant conceals the material facts and files a fabricated document, it may be necessary to punish him for contempt, as such a course of conduct abuses and makes a mockery of the judicial process and which thus extends its pernicious influence beyond the parties to the action and affects the interest of the public in the administration of the justice. Relying on Ram Krishan and

Sons Charitable Trust Ltd. (*supra*), it is contended by the counsel for the defendant that the plaintiff is liable to be non suited and the application of the plaintiff for interim relief is liable to be dismissed on account of concealment and deliberate mis-statement of material facts and production of fabricated documents. A Division Bench of this Court had held that the party who approaches the court for discretionary relief, should candidly and forthrightly narrate all material facts in the plaint and/or the application for injunction. Relying on Hanamantha Ranoji v. Sri Mahadev Channabasappa, (2000) 6 SCC 120; 2000 (4) Scale 692, S.P. Chengalvaraya Naidu v. Jagannath, AIR 1994 SC 853, The Advocate General, State of Bihar v. Madhya Pradesh Khair Industries; AIR 1980 SC 946, Delhi Development Authority v. Skipper Construction, JT 1995 (2) SC 391 and Satish Khosla v. Eli Lilly Ranbaxy Ltd., 71 (1998) DLT 1, it was held that filing of a fabricated document or misleading court calls for strict action to be taken against the guilty for purporting the fraud upon the court or in any way misleading the court. It was held that it is beyond cavil that any party guilty of such an act stands disentitled to the grant of any equitable relief.

43. In S.P. Chengalvaraya Naidu (*supra*), a preliminary decree was obtained by withholding a vital document in order to gain advantage on the other side. The Supreme Court had held that in such a case a

person whose case is based on falsehood, can be summarily thrown out at any stage of the litigation. Another single Judge of this Court in Om Prakash Gupta (*supra*) held that concealment of material facts or filing fabricated documents or otherwise making any mis-representation in the court has to be viewed seriously and in such circumstances the person misleading the court or filing fabricated documents shall not be entitled for any discretionary relief. It was held that the courts of law are meant for imparting justice between the parties and one who comes to the court must come with the clean hands. A person whose case is based on falsehood has no right to approach the court and he could be summarily thrown out at any stage of the litigation.

44. On the preponderance of probabilities and on prima facie view, it has been held that the documents relied on by the plaintiff have been fabricated by him. The plaintiff had also been granted ex-parte injunction against the defendants on the basis of these documents which has been vacated. In the facts and circumstances of this case, at this stage it will not be appropriate to take action for committing contempt of this Court against the plaintiff. Whenever the Court after trial will come to final conclusion about the fabrication of documents by the plaintiff, this Court would be entitled to take appropriate action against the plaintiff in accordance with law.

45. In the circumstances, for the forgoing reasons, the application of the defendant under Order XXXIX Rule 4 being IA No.2761 of 2009 is allowed and the ex parte injunction order dated 9th February, 2009 restraining the defendant from using the trade mark 'Kanz' is vacated and the application of the plaintiff under Order XXXIX Rules 1 and 2 is dismissed. The application of the defendant being IA No.2762 of 2009 is allowed and the plaintiff is restrained from using the trade mark 'Kanz' of the defendants in any manner himself or through his partners, agents etc. and from reproducing, displaying or advertising the said trade mark and use it on any of his products in any way and passing of his goods as that of the defendants during the pendency of the present suit. The plaintiff shall also be liable to pay cost of Rs.10,000/- to the defendant. Cost be paid within four weeks. The applications are decided accordingly.

CS(OS) No.213/2009

List on 26th November, 2009 before the Regular Bench, subject to orders of Hon'ble the Chief Justice

Copy of the order dasti to the parties.

November 20th, 2009. **ANIL KUMAR J.**

'k & Dev'